2006

Stone Creek Landscaping v. Bell : Reply Brief

Utah Court of Appeals

IN THE COURT OF APPEALS
STATE OF UTAH

STONE CREEK LANDSCAPING, L.L.C., a Utah Limited Liability Company Plaintiff, Appellee v. TRAVIS BELL, SUNRISE BELL, AMERICA FIRST CREDIT UNION a Utah Corporation; and JOHN DOES 1-10; Defendants, Appellants	**REPLY BRIEF OF APPELLANT** Appellate No. 20060568-SC Civil No. 040700430 Judge Darwin C. Hansen
TRAVIS & SUNRISE BELL Counter Claim Plaintiffs, Appellant v. STONE CREEK LANDSCAPING, L.L.C. a Utah Limited Liability Company: and RANDY WADDOUPS Counter Claim Defendants, Appellee AMERICA FIRST CREDIT UNION, Cross Claim Plaintiff, Appellee v. TRAVIS & SUNRISE BELL, Cross Claim Defendant, Appellant	

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1. THE TRIAL COURT INCORRECTLY CALCULATED DAMAGES.

A. The Bell's Have Appropriately Marshaled The Evidence.

Stonecreek complains that the Bell's have failed to marshall the evidence with respect to their claims that the court incorrectly determined the amount of damages. This is not so. The court's calculation and determination of how it came up with the damages figure is set forth verbatim in the Bell's opening brief. The Bell's initial argument is that the trial court's methodology of calculating damages is incorrect. This argument os one of law and requires no marshaling of evidence. The second portion addresses additional items overlooked even if the court's methodology were correct.

The trial court found there was an enforceable contract between the Bell's and Stonecreek. The court also found that Stonecreek had breached the contract with the Bells. The court then went on to determine what damages were compensable under the terms of the breach. The court simply started with the total contract price, subtracted the undisputed payments from the Bell's to Stonecreek and finally adjusted that for work which the court found to for work paid for by the Bell's to Cottonwood Landscaping. It was the court's ruling that additional repair work, not completed at time of trial, or additional work that had not been finished at all could not be used as offsets.

The problem with the court's ruling is that it begins with a figure of $30,000.00, the total that would have been paid if the contract had been completed and completed in a workmanlike manner. Since the court, had already ruled that was not true, the use of the $30,000.00 figure was an error as a matter of law. No evidence need be marshaled for this. A review of the rest of the argument shows that no amount of "marshaling" changes the results.

B. All Materials Were Not Provided In Accordance With The Contract.

Contrary to Stonecreek's allegations, it is Stonecreek not the Bell's who have failed to marshall the evidence with respect to the claim that all materials were not provided in accordance with the contract. In the Bell's initial argument they cited directly to the trial transcripts and exhibits presented at trial to show not all plants were delivered in accordance with the contract between the parties. In their argument section not one single reference is made to any transcript testimony. Instead Stonecreek relies on general self serving assertions.

Under direct examination, by his own counsel, Randy Waddoups of Stonecreek testified that the plantings that were to be made were according to the plan that was Plaintiff's Exhibit 4. T. 25 L. 8-11. The $30,000.00 bid, plaintiff's Exhibit 6, specifically outlines charges for plants on the drawing of $8,800.00 and an additional charge of $2,200.00 for plants not shown on the original plan.

At no point does Stonecreek provide any testimony that it provided additional plants. The only testimony on this point is that of Mr. Bell who testified that no additional trees were planted. T.328. What Stonecreek does testify to however is just as telling on this point.

Randy Waddoups originally testified that he planted items only in accordance with the original landscape plan. T.25. He subsequently changed his testimony and said he reduced the number of planting's he was supposed to make according to Exhibit 4, but didn't bother to tell the Bell's about the adjustment. T.61. According to Mr. Waddoups, this reduction was allegedly made to adjust the contract price down to the $30,000.00 bid price. Stonecreek's Brief pg. 33. Yet the actual bid, with the $30,000.00 figure includes not only the trees in the budget, but purportedly an additional $2,200.00 for even more trees. The only purported testimony not "marshaled" by Bells was that the Waddoups

claimed to have completed all plantings with the exception of the planting of two trees. R. 405, R.32 Aside from clearly being false(photographic evidence showed plants still in pots, no receipts from Stonecreek for all the plants contracted for, Plaintiff's own exhibits showing all plants ordered were not delivered) the statements don't identify whether the plantings allegedly being made were all those in the original plans, or the augmented original plans with the additional trees identified in Exhibit 6, or the mystery reduced number of plantings later testified to by Mr. Waddoups, the statements are in and of themselves irrelevant.

The Bell's also attacked the lack of plantings based on Plaintiff's own Exhibit 17 and Randy Waddoups own testimony. Those Exhibits showed an additional $3,470.00, wholesale priced, plants that were not delivered to the Bells. Stonecreek's only response in their brief is to claim the Bells failed to marshall the evidence. They have failed however to show any evidence that has not been marshaled in relation to this argument. In essence they have failed to respond at all.

C. The Bell's Should Receive A Credit For Amounts They Paid To Remedy The Defective and/or Incomplete Work of the Plaintiff.

Mr. Bell testified the electrical work on the sprinkler system was not finished at the time Stonecreek abandoned the job. T.270. The unfinished nature of the sprinkler system was clearly demonstrated in Defendant's photographs #36 and 37. Mr. Bell testified that he paid $800.00 to Oman Electric. Stonecreek even admits the payment was made in their own brief (Brief of Stonecreek footnote 6 pg 43.). Failure to give credit for the payment was clearly plain error.

The remaining two items the Bells were seeking for recovery for under this section were for sprinkler repairs and shrub replacement. The trial court failed to give credit for these items because they

were included in an invoice with other items which were not recoverable. The lack of recoverability of the other charges should not however have impacted these items. The undisputed testimony is that there was no sprinkler system or shrubbery on the property prior to Stonecreek's work and that Stonecreek had a one year warranty with respect to work and materials. The cost of the replacement and repair should therefore be borne by Stonecreek.

D. The Contract Should Be Adjusted For The Incomplete Or Insufficient Work Not Yet Remedied.

At the time of trial there was $9,000.00 worth of work, under the original contract with Stonecreek, that was either not done or needed to be completed. T.186-187. Determination of that figure was easy. Prior to Stonecreek's work there was only rock work and paving done. All other work was therefore performed by Stonecreek. Further Stonecreek's bid was based on Exhibit #4 which was given to Dan Cloward and the bid itself Exhibit #6 was given to Cloward. Based on these items Cloward was able to determine that the cost of completion and/or correction would be $9,000.00. This meant there was at least $9,000.00 worth of work and materials that were not provided in conformance with the contract.

Stonecreek failed to provide any actual evidence, i.e pay cards, cancelled checks or other hard evidence that they had completed the contact and indeed the court specifically found that they had not. Since the court found Stonecreek to be in breach of the contract it was improper not to reduce the amount due to Stonecreek under the terms of the contract. This is again a legal issue, not a factual one. The Court's use of the $30,000.00 figure was in clear error.

II. THE BELLS WERE THE PREVAILING PARTY.

The Bells' principal argument against the awarding of attorney fees to Stonecreek was that they not Stonecreek were the prevailing party and that accordingly they not Stonecreek should be awarded attorney fees.

Stonecreek has not responded at all to this argument. Instead in the Appellee portion of its brief Stonecreek argues that its failure to separate its fees should not be fatal to its claim and in the Appellant portion of its Cross Appeal argues that the court's reduction of the claimed fees was improper. Neither of these arguments has any relevance since they only come into play if Stonecreek were the prevailing party. The unrebutted argument, set forth in the Bells' initial brief, shows that even under the generous award of the trial court Stonecreek only "won" one of the three causes of action it brought and of the one it purportedly won it achieved only 1/3 of the claim under that cause of action. Since it was not the prevailing party Stonecreek is not entitled to any fees or costs.

A. Stonecreek's Failure to Separate its Fees Dooms its Claim.

As set forth in the Bell's initial brief, the Utah Supreme Court in *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005) and *Foote v. Clark*, 962 P.2d 52 (Utah 1998) requires prevailing parties to categorize their time and fees between successful claims for which there may be an entitlement of fees, unsuccessful claims for which there may have been an entitlement had the claims been successful and claims for which there is no entitlement to fees.

As predicted in that opening brief, Stonecreek claims that all of the claims were interrelated and therefore it had no duty to distinguish between them. To that end Stonecreek cites to the case of *Ellsworth Paulsen Const. Co. v. 51-Spr, L.L.C.* 144 P.3d 261 (Utah App. 2006). *Ellsworth* is

clearly distinguishable from this case in that here, unlike *Ellsworth,* the contractor lost the breach of contract claim. This means that the breach of contract claim would fall into the second category under *Foote,* claims for which there might have been an entitlement had the claims been successful. Stonecreek's failure to separate its claims should result in the denial of the claim in total.

B. Stonecreek is Seeking Recovery of Non-Taxable Costs.

Stonecreek fails to understand the difference between "taxable costs" and "legitimate expenses of litigation". Not everything necessarily incurred in litigation is a taxable cost. *Frampton v. Wilson,* 605 P.2d 771, 774 (Utah 1980).

Stonecreek's argument, in its reply portion of its brief, is that award of costs is simply a discretionary decision of the trial court judge. They cite to no authority to support this argument and it is directly contrary to the rulings of the Supreme Court in *Frampton* and this Court in *Morgan v. Morgan,* 795 P.2d 684 (Utah App. 1996). These cases restrict taxable costs and accordingly the costs awarded, if Stonecreek were the prevailing party, should be reduced to $283.00.

III. THE CREDIT UNION SHOULD NOT BE AWARDED ANY FEES.

America First Credit Union filed a Third Party Complaint against the Bells alleging ti was entitled to recover its attorney fees against them under Paragraph 9 of the Deed of Trust. It tried its case under the sane provision, and was awarded judgment. The Bell's appealed that award and addressed the argument in their opening brief.

In its reply brief the Credit Union does not even address paragraph 9, but now seeks to recover its fees under paragraph 4 of the Deed of Trust. Clearly it is inappropriate, for the Credit Union to receive an award for a different provision than that it claimed. Since no reply was made to the argument

regarding paragraph 9 the Bells will consider that argument conceded and accordingly focus on the new claim under paragraph 4.

Paragraph 4 entitles the Credit Union to appear in or defend an action affecting its security and requires the Trustor to pay the reasonable sums incurred for such defense or appearance.

By its own admission, the Credit Union entered into this litigation knowing its position was junior to Stonecreek's if that lien were legitimate. To protect that interest the Credit Union had required the deposit of funds to cover the eventuality of any claims. The Credit Union took no action to defend its position in the litigation it simply took positions seeking to obtain fees from the Bells.

It is unreasonable for the Credit Union to have incurred the costs and fees it did where it took no action to protect its security interest. Since the costs were unreasonable and the provision cited is not the one claimed in the Cross Claim the fees award should be reversed.

REPLY TO CROSS-APPEAL OF STONECREEK

IV. THE CLEAR EVIDENCE SUPPORTS THE COURTS OFFSET AWARD.

Stonecreek cites to the case of *Martindale v. Adams*, 777P.2d 514 (Utah App. 1989) for the proposition that Dan Cloward's testimony was in some fashion defective as proof of the inferior workmanship and lack of completion of Stonecreek. In *Martindale* the witness called testified "he had no personal knowledge of Martindale's involvement with or responsibility for the defects he identified." On the other hand the contractor testified "he had not worked on, caused, nor had responsibility to repair those defects..." *Martindale* at 517.

This is completely different from the case at bar. Indeed in Mr. Cloward's testimony beginning at T.184 he clearly outlines his familiarity with the bid of Stonecreek and since he himself worked with

the crews to do the work on the Bells property he was aware of the deficiencies. Furthermore, there is no testimony by Stonecreek that they did not do the work that was being fixed, in fact just the opposite is true. The undisputed testimony is that with the exception of the rock work and paving, no landscaping was done prior to Stonecreek and no other contractors excepting Oman electric worked on the landscaping prior to Cottonwood. T.284. Finally the cases are easily distinguishable because here Mr. Bell also gave detailed testimony as to the defects on the property left by Stonecreek. That testimony was supported by photographic evidence admitted by the trial court. In *Martindale*, the trial court found that the homeowners testimony was "mostly unintelligible and altogether unhelpful to proving the merits of his counterclaim." *Martindale* at 517 n.5.

V. STONECREEK WAS AWARDED MORE THAN THE VALUE OF SERVICES IT PROVIDED.

The trial court found that Stonecreek breached its contract with the Bells. T.453. It was therefore Stonecreek's burden to prove the value of the services they provided. They did not. The only methodology by which Stonecreek seeks to establish their damages, is based on a comment made by Mr. Bell in a sales brochure for the sale of the property. In that brochure Mr. Bell stated he had done approximately $96,000.00 worth of landscaping work on the project. When counsel for Mr. Bell sought to address this issue in closing the following exchange took place:

> Mr. Turner: Okay. Counsel - what I'd like to do is address really quickly counsel's points that - I've got five points that he made. One of them is dealing with these math issues which I think are important. Mr. Bell stated in selling his house he'd made a representation that there had been $96,000.00 worth of landscaping.
> The Court: I don't see that as a factor in this case, so let's go forward.

T.438.

The trial court clearly recognized this for the red herring it is. There was no testimony solicited

as to how the figure was derived or what the value was of the work performed by Stonecreek. There was not even any testimony to establish the accuracy of the figure.

If however the court had looked at the elements comprising the figure it should have reduced the starting point at which it calculated damages. Mr. Bell testified that he had paid 62 to 64 thousand for the rock work. The trial testimony was that the Bells paid $18,203.59 to or on behalf of Stonecreek . Additionally Mr. Bell paid $12,500.00 to Cottonwood Landscapes and $800.00 to Ohman Electric. The sum total of these amounts is roughly $95,500.00. Just as Mr. Bell claimed in his sales pitch.

The evidence is more than clear that the work performed by Stonecreek was not complete, of inferior quality and excessively delayed. It is also clear Stonecreek failed to prove the value of any services it performed for the Bells.

VI. THE TRIAL COURT ERRED IN AWARDING STONECREEK ANY FEES.

As demonstrated in the Bells original brief and in the Reply above, The Bells not Stonecreek were the prevailing parties, accordingly no fees should be awarded Stonecreek in any case. Furthermore Stonecreek improperly failed to segregate their fees and under *Jensen*, the fees should denied for that reason.

If however fees were to be awarded, the Court's determination as to the reduced amount of fees was appropriate. Stonecreek raised three separate causes of action, against the Bell's, in their Complaint. Unjust Enrichment, Breach of Contract and Foreclosure of Lien. At the conclusion of trial the Court ruled there was a contract and therefore the claim for unjust enrichment failed. The Court also ruled that the alleged breach by the Bell's had been waived and that Stonecreek not the Bells was in breach of the contract. Finally the Court ruled that on the third claim, Stonecreek was entitled to

foreclose its lien, but only in an amount of roughly 1/3 the principal and interest claimed.

In evaluating Stonecreek's legal fees the Court recognized it was only entitled to fees for those items where it prevailed, and in this instance that comprised 1/3 of the fees claimed. Since the Bells prevailed on the key point in their counter claim, breach of contract, the Court was correct in determining the amount of fees requested was not reasonable and accordingly reducing them.

Stonecreek makes much of the policy reasons for awarding them their overweening demand for attorney fees, which total seven times the actual court award. The policy considerations however cut both ways. The fees weren't cut because they were grossly disproportionate to the amount of the claim. They were cut because of the failure of Stonecreek to win. To simply award tens of thousands of dollars to any mechanic's lien litigant who recovers minute portions of their claims encourages the behavior seen here where demands in excess to those actually payable are made. If Property owners are going to have to pay exorbitant legal fees in spite of prevailing against the bulk of the demanded payments, mechanic's lien claimants will be able to extort those excess payments from the property owner as fees such as those incurred here will swamp the excessive claims.

If the mechanic's lien claimant cannot prove his claim, he should bear the risk of his own attorney fees.

VII. STONE CREEK SHOULD NOT BE AWARDED ANY ADDITIONAL COSTS.

The full issue of what costs are legally taxable has been fully covered in the Bells initial brief and the section on costs in the Reply above. The Bells accordingly submit this issue on those arguments.

CONCLUSION

The Bell's fully marshaled all necessary evidence to decide the issues set forth in their Appeal.

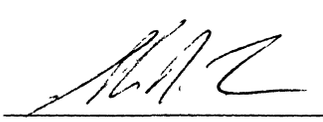
The simple selective recitation of tiny portions of the trial transcripts in a separate section does not adequately marshall such evidence. It is only when the evidence is put in context of the argument that it is adequately addressed, in a manner to allow the Appellate Court to Review the trial court's ruling, and the Bell's not Stonecreek have done so in their briefs.

This case is very simple. The Bell's contracted for landscaping to be performed by Stonecreek. Stonecreek breached that contract in failing to finish its work and by performing the work it did finish in an unworkmanlike manner. The Bells succeeded in showing that the amount claimed by Stonecreek in its lien was excessive. The plain clear testimony and evidence demonstrates that the amount awarded by the trial court to Stonecreek was in excess of the amount that should have been allowed. Although the trial court erred, as a matter of law, in the way it calculated those damages, it is still clear that the Bell's were the prevailing parties and Stonecreek's claims for costs and fees should be rejected.

Based on the plain error that exists in the Trial Court's ruling, this Court should reverse the Trial Court and find that Stonecreek and the Credit Union are entitled to nothing and order an award of attorney fees and costs in favor of the Bell's.

DATED this 16th day of January, 2007

LARSON, TURNER, DALBY & ETHINGTON



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2007 a true and correct copy of **Reply Brief of Appellant** was mailed, postage prepaid, to the following:

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